Supreme Court, U.S.
FILED

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No.

In the

# Supreme Court of the United States

JAMES BLACK; STEPHEN GLASPER; ROBERT RITCHIE,
*Petitioners,*

*v.*

TARGET STORES, a division of DAYTON HUDSON CORPORATION; MERRILL NELSON; MICHAEL B. ANDERSON; STEPHANIE BERTRAM; JOHN DERHEIMER; AMY ADLER; CHERYL RIPLINGER; STEVE KENADY; AMY RICHMOND; NORA O'NEILL; VICKI KESSLER,
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. THIS COURT MUST EXERCISE SUPERVISORY POWER TO CORRECT THE DEFICIENCIES OF THE LOWER COURTS.

II. THE PETITIONERS SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT BY SUBMITTING SUFFICINT DIRECT EVIDENCE TO OVERCOME A DISMISSAL ON THE ISSUES OF RETALIATION CLAIMS AND VIOLATIONS OF TITLE VII, MINNESOTA HUMAN RIGHTS ACT §363, AND 42 U.S.C.A. § 1981 THEREBY VACATING THE PETITIONERS' CONSTITUTIONAL RIGHTS TO A JURY TRIAL.

III. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit dated October 24, 2001, is set forth in the Appendix, p.30a-31a. The opinion of the United States District Court for the District of Minnesota dated September 25, 2000 is set forth in the Appendix, p.1a-29a.

## STATEMENT OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on October 24, 2001. This Petition was timely filed.

## CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

**Constitutional Issues**

1. Seventh Amendment of the United States Constitution.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. Fourteenth Amendment, United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

**Statutory Issues**

The provisions of Title VII under 42 U.S.C. § 2000e, et seq.(Pet. App. pp.41a-44a), the Equal Rights Under the Law found in 42 U.S.C. § 1981 (Pet. App. pp.35a-40a) and the Minnesota Human Rights Act under Minn.Stat. § 363.03, et seq. (Pet. App. pp.30a-35a) relevant to this petition are reprinted in the Appendix as noted.

## STATEMENT OF THE CASE

**Procedural History**

On November 20, 1997, James Black, Robert Ritchie and Stephen Glasper, (hereinafter "the Petitioners"), residents of the District of Minnesota, filed their complaint with particularity against Target Stores, a division of the Dayton Hudson Corporation, Merrill Nelson, Michael Anderson, Stephanie Bertram, John Derheimer, Rita Baker, Amy Adler, Cheryl Riplinger, Steve Kenady, Amy Richmond, Nora O'Neill, and Vicki Kessler alleging under Title VII retaliation, discrimination, hostile work environment; under breach of contract violations in 42 U.S.C. § 1981 consisting of retaliation, discrimination, hostile work environment, and Minnesota Human Rights Act § 363. There were various common law claims in the complaint also. The Petitioners sought judgment on their behalf, compensatory damages, punitive damages, costs and attorney fees. The Defendants brought a motion to dismiss stating the complaint filed in particularity by Petitioners was too detailed along with other objections. The District Court granted the Defendants' motion to dismiss on June 12, 1998. On June 22, 1998 the

Petitioners submitted a Rule 59(e) motion to alter and amend the judgment, and a request to amend complaint. On July 23, 1998 the District Court reversed its earlier ruling and granted the Plaintiffs Rule 59(e) motion with instructions to the Petitioners not to state cases with the detail that it had previously submitted the claims or risk dismissal. On August 3, 1998 the Petitioners served the Amended Complaint consisting of Title VII claims of retaliation, discrimination, and hostile work environment. The amended complaint contained claims of breach of contract in violation of 42 U.S.C. § 1981 consisting of retaliation, discrimination, and hostile work environment. The amended complaint also contained claims for violations of the Minnesota Human Rights Act § 363 and various common law claims. On December 29, 1999 Petitioners filed a motion to compel and extend the discovery period against the Defendants. On January 4, 2000 the Court extended discovery stemming from violations of the Defendants to February 15, 2000. On January 5, 2000 the Petitioners sought to have the magistrate amend the order, thus discovery was suspended until after the hearing scheduled on February 3, 2000. On February 7, 2000 an order was given extending discovery to November 18, 2000. On February 8, 2000 an amended order was given extending discovery to February 18, 2000. On June 5, 2000 the Defendants brought a motion for summary judgment. The Petitioners submitted an opposition to the summary judgment motion, and various depositions, affidavits and other evidence to the court. The hearing took place on August 31, 2000 the District Court heard the arguments of counsel for the parties. During the argument the Defendants counsel misconstrued items listed in the record before the court, thus on September 1, 2000 the Petitioners' counsel provided the court with a supplement to clarify items already listed in the record such as: a performance evaluation prepared by Target showing that Petitioner Ritchie was doing well in his management position that was submitted the same day he received a verbal warning from Target; a former sexual harassment complaint made by Riplinger where it the allegations made by another African American male were similar to the allegation made by Petitioner Black against

Riplinger; and information showing that Petitioner Glasper had adverse employment actions start immediately after he complained about discriminatory practices. All of these items were misconstrued in oral argument by the Defendants counsel and were already part of a detailed record. Even though this information was already in the record, the court attempted to send the entire filing of the supplemental motion back to counsel, however it had been file with the clerk and had been listed as document number 103 of the District Courts docket. In addition, to the items listed in the supplement which reinforced the record, and the record before the District court contained statements by Rita Baker, a white Human Resource manager, that said the defendant decision maker Merrill Nelson who was in charge of the committee for hiring and firing lower level managers, including the Petitioners asked her why she was hiring all of those Blacks. Rita Baker stated that Merrill Nelson's remarks also included other inflammatory and racial related remarks. The record also included a report completed by Target showing the attrition status of its managers and whether Target would hire them again, and Target stated that they would rehire the Petitioners Ritchie and Glasper, which dispels all of their allegations of the Petitioners poor work performance. On September 25, 2000 the District Court granted the Defendants summary judgment motions stating that there were not any material issues in question, but failed to address the issue of retaliation under Title VII or 42 U.S.C. § 1981 in the order when granting the summary judgment of the Defendants. On October 23, 2000 Petitioners' counsel filed a timely notice of Appeal. The Eighth Circuit denied the request for oral argument, and filed a decision affirming the District Court's ruling on October 24, 2001. In addition, the Eighth Circuit stated that its ruling was based upon a submission of the Petitioners under 42 U.S.C. § 1983 which is incorrect, the claim was submitted under 42 U.S.C. § 1981. Further, the Eighth Circuit also failed to address the issue of retaliation under Title VII or 42 U.S.C. § 1981.

**Statement of the Facts**

**(A) Where there sufficient material facts in controversy warranting a ruling in Petitioners' favor regarding the claims of retaliation, reprisal and discrimination.**

**(i) Petitioner Robert Ritchie**

**February 23, 1995**

Petitioner Ritchie is the Guest Services Team Lead at Lake Street store on this date according to records of Target.

**February 27, 1995**

Petitioner Ritchie who had expected to be transferred Lake Street with a promotion was informed by Kumal Saleem the day before reporting it was lateral move. Therefore, remaining a Guest Services Team Lead, in charge of cashiers and the front end of the store. Saleem also congratulated and thanked Petitioner Ritchie for doing a good job. This conflicts with statements made by Saleem in his affidavit in this matter.

**February 28, 1995**

Petitioner Ritchie transferred from Edina to the Lake Street Store where Nelson was the "Store Team Lead", and once there in February Petitioner Ritchie was given a tour by a management staff person and was told that he could use profanity and say anything to the customers in a majority minority shopped store. Petitioner Ritchie opposed this statement. It was common practice for customers in Edina (major majority store) and Lake Street to receive different treatment, which is a violation of Minnesota Human Rights act.

**February/March 1995**

Petitioner Ritchie was told to treat an African American cashier by the name of Sarah Mack with kid gloves, not to get too close to her and to **stand guard** over Ms. Mack due to the fact she was suing Mr. Nelson for race discrimination. Petitioner Ritchie found out other information concerning

cashier, Sarah Mack, from Ms. Baker. Mack had complained and filed an EEOC complaint in September 1994, which was about African American cashiers being watched for theft, while white cashiers were not being watched. Baker told Petitioner that management did not him to associate with Mack due to her claims of racism; Petitioner Ritchie questioned this stance of management.

**March 1995**

Petitioner Ritchie attends diversity meeting where Robert "Bob" Silcox (a person that sits on the diversity and decision making management hiring committee with Merrill Nelson) makes the comment that there is "White Privilege" at Target and he was not about to give it up, and Petitioner Ritchie questions the comment in front of the group standing up for his and others civil rights. Petitioner Ritchie is then pulled aside by his old manager from Edina, Kumal Saleem, and Saleem told Ritchie that he should have kept his mouth shut and not made that comment. During the meeting Ritchie learned from Glasper, a diversity committee representative, that Merrill Nelson has made the very same comment at a previous meeting. In addition, Petitioner Ritchie attends another diversity meeting following the meeting where Silcox made his comment about "White Privilege". Petitioner Ritchie challenged this ideology stemming from Target, and was told he should have not questioned the statement.

**March 1995**

Petitioner Ritchie goes to human resources team lead Rita Baker, a white female, and makes a complaint about the discriminatory comment regarding "White Privilege" he heard himself by Robert "Bob" Silcox, and that of Merrill Nelson in which he was informed about being said by Petitioner Glasper.

**March 1995**

Petitioner Ritchie spoke to Merrill Nelson and Rita Baker concerning the problems with the system as well as the problems left behind by white store executive Troy Rensloe and being treated unfairly as an African American manager

**March, April and May 19 ,5**

Petitioner Ritchie Spoke to Rita Baker continuously concerning the problems with the system and the problems left behind by white store executive Troy Rensloe. Petitioner Ritchie unlike Rensloe was required to run remote tender all the time and on a reduced budget, even though it was necessary to have more funds. Remote tender was an anti-theft project that required two cashiers at one register, which allowed the cashiers to watch one another. This required an almost doubling of the staff, thus, it required more fund to operate this program. Further, Petitioner Ritchie found that remote tender full-time use had failed in Chicago, but he was still forced to implement it due to the fact Nelson though it would stop theft in store by having two cashiers at each register. This complies with the charge of race discrimination made by cashier Mack. Petitioner Ritchie challenges this ideology in discussing it with Nelson, Baker and staff management.

**March 27, 1995**

Petitioner Ritchie received an S+ rating on his 1995 Executive Performance Review from former manager Kamal Saleem, and an overall team score of 84 that was a score of excellent. This evaluation give by Saleem contradicts his affidavit offered in this matter. On the same day Petitioner Ritchie received a verbal warning by Ms. Nora O'Neill for allegedly not following directions and running the remote tender program on the reduced budget that O'Neill allocated to him. This event happened right after Petitioner Ritchie complained about racial discrimination waged against others and himself at Target Lake Street.

**March, April, May 1995**

Petitioner Ritchie complains about the return policy at Target Lake Street as compared to the Edina stores a violation of the Minnesota Human Rights Act business subdivision.

**Before May 8, 1995**

Petitioner Ritchie complained to Merrill Nelson prior to being phased about the unfair treatment of African American staff and guest (customers).

**May 1, 1995**

Petitioner Ritchie given short period of time to correct all the problems that he inherited, including the faulty remote tender system, and was told to use a band aid approach by Merrill Nelson. Petitioner Ritchie was given deadlines of 5/18, 6/1, 5/13, 5/7, 5/19, 5/6 and 5/5.

**May 3,4 and 5, 1995**

Petitioner Ritchie out sick for which he had a doctor's note, and for which his fiancé called in for him on May 5, and for which Petitioner Ritchie called in and spoke to one of his subordinates and Ms. Baker. However, Petitioner Ritchie was disciplined when he brought in a doctor's note.

**May 8, 1995**

Petitioner Ritchie was phased by Nelson and O'Neill.

**May 11, 1995**

Petitioner Ritchie after speaking to the African American Store Team Lead manager of the inner city Knollwood store, Ms. Gloria Jackson, told Ritchie "you know Merrill Nelson's attitudes towards African Americans you have to get out of there." Petitioner Ritchie then sits down and writes a letter discussing the issues of discrimination and unfair treatment to District Manager, John Derheimer, expecting to get some help. Petitioner Ritchie carbon copied both Nelson and O'Neill. Ritchie had discussed all of these issues with human resource manager Rita Baker

numerous times in March, April and May prior to this letter being sent to Derheimer.

**May 13, 1995**

Amy Richmond-Edwards was asked to and writes an adverse report concerning Petitioner Ritchie, but was not asked to write notes on white managers.

**May 15, 1995**

Amy Richmond-Edwards, a white manager left adverse reports on Petitioner Ritchie.

**May 17, 1995**

Stephanie Bertram-Jukubik a white manager left an adverse note on Petitioner Ritchie, at the request of management. Petitioner Ritchie was not her subordinate or direct report. All adverse reports were made by employees, management and general staff members who were white. This store had significant African American employee roster. Bertram-Jukubik was not asked to keep similar notes on white managers.

**May 26, 1995**

An adverse report placed into Petitioner Ritchie's file stating he humiliated a white staff person, Karen Pendleton, during a rush to correct a frontlines problem. However, an African American was called a 'Nigger" by a white supervisor staff person and according to all there was not in investigation of the matter.

**June 1995**

Adverse reports typed on sheets of paper which include back dates stemming from May 1, 1995 to June 17, 1995 were placed in Petitioner Ritchie's file without him seeing them or with out a signature from Ritchie.

**June 7, 1995**

In the meeting where Petitioner Ritchie was discharged he was not allowed to provide explanations of the events surrounding the software and hardware problems. Further, Petitioner Ritchie was not allowed to speak at all concerning the issues of discrimination. After Petitioner Ritchie was forced to leave Target by discharge, he went to Ms. Baker's office and cried. While crying Ms. Baker told Petitioner Ritchie that she had seen Mr. Nelson "Do this before". She had seen Nelson force people out of the company before.

**After Termination Report Rehire**

A Target document states that they would rehire Petitioner Ritchie if he were to reapply. This provides a material issue that is in question.

**(ii) James Black**

**March/April 1995**

Petitioner and diversity team member, Black hears Nelson's White Privilege comment and ideology of Target and immediately asks Merrill Nelson about the "White Privilege" comment he made at the diversity meeting.

**June 1995**

Petitioner Black complained about the unfair firing of Petitioner Ritchie, and how there was differential treatment for Ritchie as opposed to the treatment of Rensloe and Gullard, the white predecessor and replacement of Petitioner Ritchie.

**June 1995**

Petitioner Black who had a contract to become a Store Team Lead, and told Nelson that he did not want to be pigeon-held into an inner city store when he was promoted to that position. The Petitioner did not want the opportunity to be a manager at a store in

a predominately African American inner city community, but rather wanted to have the opportunity to be place at any store including those in white communities where the bonuses were greater for Store Team Leads. The persons that knew this were Merrill Nelson, Amy Richmond-Edwards and Nora O'Neill.

**August-late July 1995**

Petitioner Black trained his staff members well and got the most out of them was surprised when the white managers wanted to take his staff members away. Petitioner Black while in an executive staff meeting with Stephanie Bertram-Jukubik got into a heated discussion with Ms. Bertram-Jukubik concerning the fact that they wanted to give Black poor performers for his high performers that he had trained well which included Cheryl Riplinger. The other people present were Merrill Nelson, Nora O'Neill, Janie Gullard and Amy Richmond-Edwards. Petition Black believed this to be an act of discrimination since he had made complaints about Petitioner Ritchie's firing under false allegations concerning performance.

**August 1995 Suspension from store**

Three to four weeks before Petitioner Black's suspension and firing he had the a heated discussion with Ms. Bertram-Jukubik in a management staff meeting before Merrill Nelson and complaints about Ritchie's discharge.

**August 1995**

Riplinger was given a paid vacation to Duluth. During the process of investigation it is found that not all of the investigation was completed prior to Petitioner Black being fired, and it was also found that Nelson and Richmond-Edwards suppressed facts that would exculpate Petitioner Black. Alan Eiynk and Chris Patnoe told Nelson and Richmond-Edwards about the sexual exploits of Ms. Riplinger and how she

conducted herself, but no notes were taken from them. Further, it was already in the file that Mr. Willie Smith stated that Riplinger had sexually harassed him. Once again Bertram-Jukubik was asked to write up the investigation even though she was a person that had an heated argument with Petitioner Black. In addition, they were told to not to say anything about the matter after they gave their statements and no notes taken from them, and if they said something they would be fired. Further, Robert Kenady the Regional Personnel Director said Petitioner Black should not have been fired prior to the investigation being completed. In the meeting where Petitioner Black was dismissed he told them before he was fired he was going to seek legal counsel. In reviewing the documents, most of the documents submitted in the incident concerning Petitioner Black and Riplinger do not have dates on them. Nelson told Petitioner Black he was improperly terminated and gives Petitioner Black a letter of recommendation. This all give rise to material facts in question concerning the dismissal of James Black.

**(iii) Stephen Glasper.**

**March 22, 1994**

Petitioner Glasper has an S+ rating on his 1994 Executive Performance Review from manager Judy Sinkoff, with a personal score of 76. The team score was a 79.

**March 1995**

Petitioner Glasper is on the diversity committee and has to attend all diversity functions and in the mist of a meeting Petitioner Glasper hears Nelson state that there is "White Privilege" at Target and he was not going to give up the "White Privilege". After the meeting Petitioner Glasper went to his manager Judy Sinkoff and asked about the term that he believes was discriminatory; decision maker Sinkoff told the

Petitioner Glasper it was just his imagination. Petitioner Glasper is also in attendance when Bob Silcox makes the same offensive and discriminating statement. Petitioner Glasper also complains about loss prevention, asset protection persons following African Americans soon as they entered the Cottage Grove Store for no reason. This was a requirement of the loss prevention persons in suburban stores.

**March 24, 1995**

Petitioner Glasper receives an S rating on his Executive Performance Review from Judy Sinkoff and a personal score of 60. Which was an immediate adverse employment action under Title VII, Minn.Stat. § 363.03 et seq. and 42 U.S.C. § 1981 retaliation.

**October 1995**

After his transfer to another store, Petitioner Glasper questioned the dismissal of Black and Ritchie, and asked Michael Anderson about the "White Privilege" comment made by Merrill Nelson. Petitioner Glasper was told not to worry about anything. One week later Petitioner Glasper received a call from Michael Anderson asking him to come to his office. Once in the office Anderson complained about the work of Petitioner Glasper. Which was an immediate adverse employment action under Title VII, Minn.Stat. § 363.03 et seq. and 42 U.S.C. § 1981 retaliation. During this month the Petitioner Glasper attended a minority symposium put on by Target for minorities.

**November 1995**

Stephanie Bertram-Jukubik who took part in the dismissal of both Petitioners Black and Ritchie arrives at Eagan Target, and starts making complaints immediately regarding Petitioner Glasper. She writes notes on Petitioner Glasper, but she does not keep notes on other white managers in the store.

**December 1995 - January 1996**

Bertram-Jukubik put together many documents making various accusations. The accusations stated various things such as Petitioner Glasper not communicating with his staff, not doing various little task, not keeping his area in order, and not being prepared for the snap-back program.

**January 5 and 6th, 1996**

John Derheimer arrives at store unannounced on January 6th prior to opening on a day that Petitioner Glasper was the manager on duty at closing time on January 5th. Derheimer states that the Eagan store was the best store he had seen and gave them a 5 out of 5 points during the snap-back season. Derheimer also stated "GREAT JOB".

**January 8, 1996**

Petitioner Glasper was phase on January 8, 1996 with the allegations being does not plan strategically, does not manage proactively, and does not inspire others to act. Adler is too busy to speak to Petitioner Glasper as is required by company policy about his concerns and just ask Glasper to signs the document. Adler was going to the Lake Street Store the location where Petitioners Black and Ritchie had just been dismissed from, taking the place of Rita Baker who was being demoted and eventually was fired after she took up for Black and Ritchie.

**January 1996**

Amy Adler visiting the Eagan Store that for them to offer Petitioner Glasper a severance package before he received a phase II warning was unusual, and that upper management wanted to get Petitioner Glasper out of the company.

**January, February and March 1996**

Stephanie Bertram-Jukubik continues to write reports and gather documents on Petitioner Glasper despite good sales reports stemming from Petitioner Glasper's position and team.

**January 1996**

Petitioner Glasper's department increases sale over 40% from the January sales of 1994. In addition, his department increased sales in one way or another from November, December, January and subsequent months, until he was fired. In her note Bertram-Jukubik said congratulations to softlines, Mr. Glasper's department for a job well done, but still did not want to give Petitioner Glasper credit. However, when asked in deposition if the sales were bad if Petitioner Glasper would be blamed, Ms. Bertram-Jukubik said yes, but she did not want to give him credit for good sales.

**January, February and March 1996**

Petitioner Glasper refuted all the allegations stemming from December 1995 to February 1996. Petitioner refuted the allegations that he did not plan strategically, did not manage proactively, and did not inspire others to act by documenting all activities and providing data that could not be challenged. The Petitioners personal notes and company data reveal that he was a motivator, that he had a plan for snap-back program, and that he was strategically planning while continuing to increase sells.

**February 23, 1996**

Petitioner Glasper is phase for the same reasons listed in phase I warning. In addition, there is a violation of policy by not having a human resource person present to answer questions that Petitioner Glasper would have had at that time. In addition, there was another violation by not having a human resource person sign off on the phase II of Petitioner Glasper. Further, Mr. Glasper presented a handwritten answer to the allegations against him, which gave clear and concise responses that disputed all of the allegations. Some of the responsibilities he was blamed for not doing were duties of Stephanie Bertram-Jukubik. She admitted this in deposition. Further, all the human resource persons, Robert Kenady, Rita Baker and Amy Adler all stated Petitioner Glasper's responses to the phase allegations would have cause them some concern, and they would have need more information before dismissal.

**March 13, 1996**

Glasper was given a review following his forced resignation, and discharge. The 1996 Executive Performance Review tabulated and access Petitioner Glasper at 2.2 points away from an excellent. Glasper had a 77.78 rating. The score of 80 is an excellent.

**After Termination Report Rehire 1996**

A Target document states that they would rehire Mr. Glasper if he were to reapply. That shows that Mr. Glasper was not such a bad worker after all.

**After Petitioners' Termination Activities**

Rita Baker the white human resource person was dismissed from Target Stores after helping Ritchie, Black and Glasper. Baker receives a settlement agreement. In Deposition she stated that decision maker Merrill Nelson asked her why she was hiring all of those "African American" people and made racist remarks. This took place prior to the firing of Ritchie, Black and Glasper. White employees replaced all Petitioners. The white employee that replaced Petitioner Ritchie was not required to run the remote tender program at all. The Petitioners Ritchie, Black and Glasper all filed complaints with the EEOC in a timely fashion. Complaints filed other than race discrimination actions, hostile work environment and retaliation, were filed by Petitioner Glasper and Black. Petitioner Glasper file a claim of Age Discrimination, and Petitioner Black filed a claim of Sexual Harassment with the EEOC in a timely fashion.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT MUST EXERCISE SUPERVISORY POWER TO CORRECT THE DEFICIENCIES OF THE LOWER COURTS.

If this court determines that the Petitioners Writ of Certiorari should be granted, this Court will have the opportunity to correct not one but two major departures from accepted and usual course of the judicial proceedings, which would clear up major sanctions by the lower courts upon the Petitioners. This court must exercise its supervisory power to see that the Constitutional rights of the Petitioners are not infringed upon any longer.

The district court failed to address a major issue concerning retaliation, which would have more than altered the decision of the lower court. The District Court treated the issues of retaliation under Title VII as well as under 42 U.S.C. § 1981 as non-issues. This is not the first time that an opinion from the District of Minnesota has not ruled on all claims presented by a plaintiff. See the case of Alfredo Pena District Court case number 97-2345 and summary judgment arguments for and in opposition.

After the District Court's failure the Circuit Court failed to address the issues of retaliation under Title VII and 42 U.S.C. § 1981 also. However, the Circuit Court went even further by writing an opinion stating they based their decision upon 42 U.S.C. § 1983 rather than 42 U.S.C. § 1981.

These above deletions and misguided analysis have caused sanctions to fall upon the Petitioners, which were not warranted nor are acceptable under the usual course of judicial proceedings. These lower court inflicted sanctions violate the rights of the Petitioners and must be remanded for procedural integrity.

## II. THE PETITIONERS SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT BY SUBMITTING SUFFICINT DIRECT EVIDENCE TO OVERCOME A DISMISSAL ON THE ISSUES OF RETALIATION CLAIMS AND VIOLATIONS OF TITLE VII, MINNESOTA HUMAN RIGHTS ACT §363, AND 42 U.S.C.A. § 1981 THEREBY VACATING THE PETITIONERS' CONSTITUTIONAL RIGHTS TO A JURY TRIAL.

If this Court determines that the Petitioners' Writ of Certiorari should be granted, the court must determine Target's actions prior to any adverse employment actions began and then must provide the Petitioners who presented legal requirement with convincing evidence a means to address the issues in dispute. Courts should not be allowed to circumvent the legal requirements or should they be allowed to change the standard of a statute when legislative intent would be disturbed. Moreover, it should be a role of the jury to determine whether the evidence proved the causes of action. The District Court's and Circuit Court's total reliance upon the District Court's analysis and discretion, caused there to be a refusal to hear the issues of the claims presented. A summary judgment motion is only appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986).* A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.* No mater how likely it may seem that a pleader will be unable to prove his case, he is entitled, upon averring claim, to opportunity t prove his case, and complaint is not subject to dismissal unless it appears to any set of facts which could be proved in support of its allegations. *Pointer v. America Oil Co., 295 F.Supp. 573 (1968).*

The Petitioners' case should have never been disposed of upon summary judgment motion. The lower court's actions were such an abuse of discretion, because the

Petitioners by way of depositions, affidavits and other competent evidence showed a substantial amount of evidence to prove their claims. The Petitioners' claims have merit since they were plead with particularity, and re-pled again by the request of the court. Also, the District Court ordered Target to comply with discovery requests; however, they failed to respond to all request, and responded to others at the last minute, thus prejudicing the s to gain access to salient information necessary to substantiate their claims. By granting the motion, the lower courts have undermined the purpose of discovery and awarded Target for not responding to requests.

Since the summary judgment was improperly granted, the Petitioners' constitutional rights to a jury trial were violated. *See Page v. Work, 290 F.2d 323, 334 (9th Cir. 1961), cert. Denied, 368 U.S. 875 (1961).* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self-government, which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts form taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquires into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; however, where the court declines to find a jury right under the statute, the court must reach the constitutional question. *City of Monterey v. DelMonte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999).* Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to

preserve the substance of the common-law right as it existed in 1791. *Id.; Markman v. Westview Instruments, Inc., 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995).* In order to preserve the right to a trial by jury in breach of contract cases and interpretation of statutes, then the Petitioners' case must be heard by a jury.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt, 293 U.S. 474, 486 (1935); Chauffeurs, Teamsters and Helpers v. Terry, 110 S.Ct. 1339, 1344-45 (1990).* So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of that right. *Grand Chute v. Winegar, 82 U.S. 373, 375 (1872); Jacob v. New York City, 315 U.S. 752, 752-753 (1942).* The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". Id.

The Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he/she is ruling on a motion for summary judgment...The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson, supra,* at 255. It would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.* The lower courts granted Target's motion without addressing the issue of retaliation, which brought on the adverse employment actions in each case presented by the s. A genuine issue of material fact exists as the terms of the retaliation, discrimination, Minn.Stat. §363 issues, and § 1981 contract issues regarding the employment dispute between Target and the Petitioners.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard for a motion for summary judgment in the District of Minnesota, and where a constitutional violations under a set order of Federal and

State laws are intertwined with and apply to the Seventh Amendment rights of the Petitioners.

## III. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The Eighth Circuit's holding in this case violates the procedural process and the elements required for summary judgment in employment cases. Under *Bassett v. City of Minneapolis*, this court held that the following:

In summary judgment cases the nonmoving party is entitled to all favorable inferences that may be drawn from the record. To establish a prima facie case of retaliatory discrimination under Title VII, 42 U.S.C. §1981 and the Minnesota Human Rights Act (MHRA), employee must show: (1) she engaged in statutorily protected activity, (2) an adverse employment action was taken against her, and (3) a causal connection between the two events.

Summary judgment should seldom be granted in employment discrimination cases. Temporal proximity between city employee's formal discrimination complaints and the city's adverse employment actions justified an inference of retaliation under Title VII and the Minnesota Human Rights Act (MHRA), and thus presented a genuine dispute of material fact, precluding summary judgment, on causal connection between employee's protected activity and the city's adverse actions, though, on occasion, employee's charges of discrimination followed rather than preceded adverse employment action. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); M.S.A. § 363.01 et seq.

For purposes of a Title VII retaliation claim, termination is an "adverse employment action" and a series of retaliatory conduct falling short of discharge or termination can, as a matter of law, constitute an adverse action. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

In passing on a motion for summary judgment, it is not the court's role to decide the merits or the credibility of the testimony. In an employment discrimination case, if evidence of the employer's proffered reason for its action is undisputed, it is entitled to a grant of summary judgment, but if the proffered reason is shown by conflicting evidence to be untrue, then the employee is entitled to all favorable inferences that the false reason given masks the real reason of intentional discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Although the City provided a nondiscriminatory reason for discharge of African- American employee, namely that she presented a disruptive presence in her job and that her job performance had been unsatisfactory, employee raised material issue of fact as to pretext, precluding summary judgment in race discrimination suit under Title VII and the Minnesota Human Rights Act (MHRA); among numerous other things, from nearly the first day of employee's employment, supervisor built a personal file on her, but did not initially maintain a similar file on the other employees until told to do so by city supervisors, and the city's evidence of alleged misconduct relied heavily on supervisor's personal notes which were written as much as six months after-the-fact. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a); M.S.A. § 363.01 et seq. *Basset v. City of Minneapolis, 211 F3d 1097-1109 ( 8th Cir. 1999 Minnesota).*

The facts of *Bassett* are analogous to the facts concerning Petitioners Ritchie, Glasper and Black. In *Bassett* the internal investigations relied heavily upon the supervisor's notes in which there are disputed facts, which also include the fact that notes were not taken on other employees. *Basset v. City of Minneapolis, 211 F3d 1097, 1099, 1100 ( 8th Cir. 1999 Minnesota)* The same is true for Petitioners Ritchie, Black and Glasper. In addition, just as in *Bassett* Petitioners Ritchie, Glasper and Black received immediate adverse job effects after they complained about discriminatory acts. *Id. 1101, 1102, 1103, 1104.* Petitioner Ritchie complained about race discrimination against African American staff and guest and raised questions about the term

"White Privilege" and the objective manifestations of white privilege at Target.

Petitioner Black complained about "White Privilege" comment and effects. Petitioner Black complained about Petitioner Ritchie's discriminatory firing, being placed in at an inner city store. In addition, in a heated argument at a staff meeting before Merrill Nelson and other management staff members, Petitioner Black refused to allow sub-par employees to be transferred to his department, and have them deplete him of his hard workers. This was attempted after Petitioner Black witnessed the dismissal of Ritchie and the allegations made against Ritchie without white employees in holding Ritchie's position receiving the same treatment

With Petitioner Glasper he complained about Robert "Bob" Silcox's and Merrill Nelson's comments of "White Privilege" to his managers, and he received an unfavorable reviews and immediate adverse employment actions. Petitioner Glaser was transferred to the Eagan store, and filed another complaint with management about an African American employee being followed and watched by staff. All managers were told to watch this person if he came into the store, except for Petitioner Glasper. After Petitioners Black and Ritchie were fired, Petitioner Glasper asked about the firing of Petitioners Black and Ritchie, the issues of comments concerning "White Privilege", and the systematic discrimination surrounding white privilege at Target.

All of the Petitioners were immediately retaliated against after they asked about protected rights under law of employment and discrimination.

The Petitioners were discriminated against and retaliated against under 42 U.S.C. 1981. The analysis is similar to that of Title VII and MHRA.

The Minnesota Human Right Act ("MHRA") makes it unlawful for employers to "intentionally engage in any reprisal against any person because that person ... opposed a practice forbidden [by the MHRA] or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Chapter."

Minn.Stat. § 363.03, subd. 7(1). A reprisal is defined under the MHRA as including "any form of intimidation, retaliation or harassment" including assignment to a "lesser position in terms of wages, hours, job classification, job security, or other employment status." Minn.Stat. § 363.03, subd. 7(2).

The three-part analysis set forth in *McDonnell Douglas* is applicable to a claim of reprisal under the MHRA. *Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn.1983).* In order to establish a prima facie case of reprisal discrimination, Appellants Black, Glasper, and Ritchie must demonstrate: (1) that they engaged in statutorily protected conduct; (2) there was an adverse employment action by Target; and (3) a causal connection existed between their conduct and the adverse employment action. *Id.* at 444.

Title VII prohibits an employer from retaliating against an employee because he or she "has opposed any practice or made an unlawful employment practice by this subchapter," or "has made a charge" of harassment, or has "participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

The elements of a claim of retaliation in violation of Title VII, 42 U.S.C. § 1981 and Minn.Stat. § 363.03 are the following: (1) the Appellant filed a charge of harassment or engaged in other protected activity; (2) the Appellant's employer subsequently took adverse employment action against the Appellant; and (3) the adverse action was causally linked to the Appellant's protected activity. *Manning v. Metropolitan Life Ins. Co., Inc., 127 F.3d 686, 692 (8th Cir.1997); Harris v. Secretary, U.S. Dep't of the Army, 119 F.3d 1313, 1318 (8th Cir.1997) ("To establish a prima facie case of retaliation, [the employee] needed to show: 1) she complained of discrimination; 2) the [employer] took adverse employment action against her; and 3) the adverse action was causally related to her complaint.");*

Once this prima facie showing is made, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions, and, if the employer meets that burden, the presumption of retaliation disappears. *Manning, 127*

*F.3d at 692 (citing Jackson v. Delta Special Sch. Dist. No. 2, 86 F.3d 1489, 1494 (8th Cir.1996).*

The fact finder is then "left to determine if [the employee] presented evidence capable of proving that the [employer's] proffered reasons for termination were a pretext for illegal retaliation." *Harris v. Secretary, U.S. Dep't of the Army, 119 F.3d 1313, 1318 (8th Cir.1997; accord Moschetti v. Chicago, Central & Pacific R. Co., 119 F.3d 707, 709 (8th Cir.1997); Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir.1997).*

Here, Petitioners' numerous complaints of discrimination fulfill the elements of the prima facie case. Petitioners complained both internally of their discrimination and finally they filed a discrimination charges with the EEOC. Petitioners Black, Glasper and Ritchie's negative evaluations; the Petitioners' increase in volume of work during phasing process; the frequent negative evaluations complied on the Petitioners after their complaints of discrimination at the request of upper management that white employees were not subjected to; Targets refusal to give Petitioners the tools to carry out their duties; Targets efforts to keep the Petitioners from expressing their concerns regarding various issues; and the Petitioners ultimate termination were the results of their engagement in protected activity followed by immediate adverse employment actions.

Petitioner Ritchie complained about "White Privilege" term in March and attended anther diversity meeting in the spring of 1995, and he received a written warning and a phase in less than one month. Prior to March 1995 and after March and April 1995 Petitioner Ritchie complained about unfair treatment of himself, unfair treatment of African American Guest, discriminatory return policies, and unfair treatment in the to Rita Baker, Merrill Nelson and finally to John Derheimer. John Derheimer refused to hear the issues of discrimination charged by Petitioner Ritchie even though he provided it to them in writing.

Soon after Petitioner Ritchie complained about the "White Privilege" term, he was given a verbal warning by Nora O'Neill, on March 27, 1995 which was the same day that

his former manager Kamal Saleem gave him a S+ rating and a Excellent rating for his team. The rating given to Petitioner Ritchie by Saleem contradicts his affidavit provided in this matter.

The Petitioner Ritchie was fired in June of 1995 and Petitioner Black asked about the discrimination surrounding the dismissal of Ritchie. Coupled with this Petitioner Black who had a contract to be promoted to store team lead asked Merrill Nelson not to be placed in an inner city store. In August of 1995 Petitioner Black was fired. Petitioner Black had also complained about the term "White Privilege" in spring of 1995 to Merrill Nelson. Petitioner Black also contested the management staff about transferring sub-par employees into his department in July or August of 1995, the very same person that he had a heated argument about transferring low performers into his unit was the same person that initiated the alleged investigation concerning Ms. Riplinger grabbing Petitioner Black's genitalia. Ms. Riplinger is still at Target kissing deliverymen on the dock. The Petitioner Black was retaliated against, discriminated against and was fired without an investigation being completed. Further, Petitioner Blacks dismissal was in the mist of a cover-up by Nelson and O'Neill. Petitioner Black's firing occurred in late August of 1995. Nelson told Petitioner Black he was not terminated correctly, and gave Black a letter of recommendation. In the middle of this whole order prior to the investigation being completed Cheryl Riplinger was give a paid vacation to Duluth, with the company picking up the tab, even though she had engaged in this type of conduct in the past and made false allegations against a Mr. Willie Smith. Smith reported that Riplinger slapped him on his buttock harassing him. Petitioner Black stated that Riplinger also harassed him.

Petitioner Glasper was retaliated against when he attended the first meeting of the three diversity meeting concerning issues of white privilege and race issues. The District Court in its misinterpretation of the facts stated that there were only two meetings, thus making a decision about credibility incorrectly, and also violating the realm of the jury. Petitioner Glasper was still at Cottage Grove, and was

on the diversity committee and attended all of the function, where he was present at a meeting where Nelson and a second meeting where Bob Silcox made the same discriminatory remark about "White Privilege" this was not a stray remark. This remark was intentional and was made to send a message, it us unfortunate that Petitioners Glasper, Ritchie and Black were dismissed under the systematic guides of "White Privilege" at Target. When Petitioner Glasper returned to Cottage Grove and asked his manager about "White Privilege" he was told everything was alright. Only about a couple of weeks later he received a poor performance review after having a high review the year before. Prior to receiving his poor review, the had also complained about African Americans being followed at the Cottage Grove store as soon as they walked in the door regardless of if they did anything. The Affidavit of Peter Berry states that it was a mandate for loss prevention to follow black people as soon as they entered the suburban stores, it was part of Target's training for loss prevention. This fact was treated as another none issue by the District Court.

In the spring of 1995 Petitioner Glasper was transferred to the Eagan store, once at Eagan he complained about another issue involving a former employee who was an African American, and the fact that all managers were told to watch him whenever he came into the store. Well all manager except Petitioner Glasper who was also African American. In addition, to this Petitioner Glasper asked questions about the firing of Ritchie and Black and the comment regarding "White Privilege", and how "White Privilege was manifesting itself in the work place as he worked for Target. Petitioner Glasper asked all of these questions of Anderson prior to Petitioner Glasper being phase or given any verbal or written warning. The retaliation and adverse employment actions occurred quickly following the civil rights and Minnesota Human Rights violations inquiries made by Petitioner Glasper. Petitioner Glasper had 18 years of experience in sales prior to his dismissal.

The Petitioner Glasper understood that Bertram-Jukubik had took part in the dismissal of Black and Ritchie,

approached decision maker Anderson and asked questions concerning the dismissal of Black and Ritchie. Petitioner Glasper also asked about the term "White Privilege" because he was feeling like a target even though his unit was very prosperous. The Petitioner Glasper continued to make inquires about discrimination and being left out of meeting. The conversations with Anderson and human resources took place during the months of October, November, and December of 1995 where adverse employment actions occurred immediately. Bertram-Jukubik came in November of 1995 and started to adversely affect the employment of Petitioner Glasper. Petitioner Glasper was phased on January 8, 1996 by Bertram-Jukubik and Anderson, even though he had recently received a favorable vote of encouragement from John Derheimer stemming from a surprise store inspection. In addition, the Petitioner Glasper's softlines unit in the month of January had increased sales over 40% from the previous year. Even in the mist of this good work Petitioner Glasper was given a second phase not more than 30 days after his first phase, which is against company policy. When the first phase came about, Amy Adler informed Petitioner Glasper that if he received a severance package offer at the first phase that the company wanted to get rid of him, and there was basically nothing he could do about it. Petitioner Glasper, went to the second phase and even though he had legitimate professional responses to the allegations, including the fact that some of the issues were responsibilities of Bertram-Jukubik herself the person conducting the phasing process. Bertram-Jukubik stated that she was responsible for some of the items in deposition. Further, this phase was conducted without a Team Relations Lead (human resources person to address the responses submitted in writing by Petitioner Glasper) present, which would have been Rita Baker. Therefore, Bertram-Jukubik and Anderson were able to do as they pleased. In his deposition Merrill Nelson admitted that he was in contact with Anderson during the dismissal stages of Petitioner Glasper, however, Anderson stated that he was not in contact with Nelson. This is a material issue. The Petitioners were retaliated and discriminated against. The

Petitioners suffered immediate adverse employment actions with were connected to the actions.

The lower courts were silent on the Petitioner' claims and evidence of retaliation under Title VII as well as 42 U.S.C. § 1981. The lower court also stated that there were no material issues that were in dispute in this matter, thus granting summary judgment. However, the record clearly shows differently, thus, the decision of the lower court conflicts with this Court's decisions, and other circuit court decisions. Further, the district court misinterpreted the facts of this matter stating that there were only two meetings when there were three, thus, stepping into the shoes of the jury, and also causing a conflict with the decisions of this Court and other circuit courts.

Petitioners have successfully shown the act of retaliation and the adverse employment actions regarding a protected act in their belief; they have shown a prima facie case regarding the discrimination; they have shown a casual and temporal connection between the acts and the retaliatory actions. The Petitioners have also successfully shown discrimination and a hostile work environment.

Therefore, the lower court's decisions being incorrect in some instances, stepping into the shoes of the jury on other instances, and failing to follow the decision of this Court and other circuits must cause this Petition For A Writ of Certiorari to be granted by this Court. This matter must be reversed and remanded to the lower court to be presented before the trier of facts in a trial on its merits, thus granting the Petitioners their constitutional rights. It is not up to the court to determine the merits of a case, it is up to the trier of facts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)
No. 00-3520

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Black; Stephen Glasper; Robert Ritchie,
Appellants,

v.

Target Stores, a division of Dayton Hudson Corporation; Merrill Nelson; Michael B. Anderson; Stephanie Bertram; John Derheimer; Amy Adler; Cheryl Riplinger; Steve Kenady; Amy Richmond; Nora O'Neill; Vicki Kessler,
Appellees.

October 19, 2001, Submitted

October 24, 2001, Filed

**NOTICE:**
RULES OF THE EIGHTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:**
Appeal from the United States District Court for the District of Minnesota.

**DISPOSITION:**
Affirmed.

**COUNSEL:**
For JAMES BLACK, STEPHEN GLASPER, ROBERT RITCHIE, Plaintiffs - Appellants: Jerrod Myron Smith, JERROD M. SMITH & ASSOCIATES, Richmond, VA.

For TARGET STORES, Defendants - Appellees: Donald M. Lewis, Joseph G. Schmitt, HALLELAND & LEWIS, Minneapolis, MN.

For MERRILL NELSON, MICHAEL B. ANDERSON, STEPHANIE BERTRAM, JOHN DERHEIMER, AMY ADLER, CHERYL RIPLINGER, STEVE KENADY, AMY RICHMOND, NORA O'NEILL, VICKI KESSLER, Defendants - Appellees: Donald M. Lewis, HALLELAND & LEWIS, Minneapolis, MN.

**JUDGES:**
Before BYE, FAGG, and RILEY, Circuit Judges.

**OPINION:**

PER CURIAM.

James Black, Stephen Glasper, and Robert Richie (the plaintiffs) brought this action against Target Stores and several Target managers (collectively Target) alleging race discrimination and retaliation claims under Title VII, *42 U.S.C. § 1983*, and the Minnesota Human Rights Act. The district court granted summary judgment to Target, concluding that even if the plaintiffs established a prima facie case of discrimination, Target showed a nondiscriminatory basis for the disciplinary action taken against each plaintiff, and each plaintiff failed to present any evidence creating a genuine issue of material fact on the issues of pretext or intentional race discrimination. Likewise, the district court granted summary judgment on the plaintiffs' hostile work environment claims because they did not show that Target's actions were based on the plaintiffs' race rather than their misconduct or deficient performance, or that Target's conduct created an abusive working environment. On appeal, the plaintiffs contend they raised a genuine issue of material fact on the pretext issue and the district court improperly rejected their hostile work environment claims. Having carefully reviewed the record, the parties' briefs, and the controlling law, we conclude the district court properly granted summary judgment to Target. Because we have nothing to add to the district court's thorough, 29-page

memorandum opinion and order, we affirm without additional discussion. See 8th Cir. R. 47B.

Footnotes

* The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

Civil No. 97-2574 ADM/AJB

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James Black, Stephen Glasper,
and Robert Ritchie,
Plaintiffs,

v.

Target Stores, a division of Dayton
Hudson Corporation, Methll Nelson,
Michael Anderson, Stephanie Bertram,
John Derheimer, Amy Adler, Cheryl
Ripplinger, Steve Kenady, Amy Richmond,
Nora O'Neill, and Vicki Kessler,
Defendants.

MEMORANDUM OPINION
AND ORDER

Jerrod M. Smith, Esq., Smith & Udiobok, P.A., Minneapolis, Minnesota, appeared for and on behalf of the Plaintiffs.

Donald M. Lewis, Esq., Halleland, Lewis, Nilan, Sipkins, & Johnson, PA., Minneapolis, Minnesota, appeared for and on behalf of the Defendants.

I. INTRODUCTION

On August 31, 2000, the undersigned United States District Judge heard Defendants' Motion for Summary Judgment [Doc. No. 82]. Defendants seek summary judgment on all of Plaintiffs' claims: (1) Defendant Target Stores ("Target") violated 42 U.S.C. §§ 2000e et seq. (Title VII), 42 U.S.C. § 1981 (Section 1981) and the Minnesota Human Rights Act (the "MHRA") by using racially discriminatory employment practices to terminate Plaintiffs' employment; (2) Defendants created a hostile work environment; (3)

Defendants aided and abetted the violations of Title VII, Section 1981, and the MHRA; (4) Defendants defamed Plaintiff Stephen Glasper ("Glasper"); and (5) Defendants intentionally caused emotional distress to Glasper. For the reasons set forth below, Defendants' motion is granted.

## II. BACKGROUND

### A. Target

During the relevant time period, each Target store was managed by a Store Team Lead ("STL"). See O'Neill Aff, ¶ 2. The STL was assisted by one or more Assistant Store Team Leads ("ASTL"), and the ASTLs in turn supervised Team Leads. See id. The Team Leads managed particular areas of the store: the "front end" Team Lead managed the cashiers, guest services, and related areas; the "hardlines" Team Lead managed items such as food, hardware, and related products; and the "softlines" Team Lead managed items such as clothing and jewelry. See id.

Target evaluated executives annually. Executive evaluations contained three parts: the "Big Team" (the store's performance), the "Little Team" (the executive's group performance), and "IDP" (individual performance). See Jakubik Aff., ¶ 11. Target rated the executive on a scale from 1 to 100 in each area. See id. The evaluation measures individual and store performance. id.

Target utilized progressive discipline. In cases of poor job performance, Target first verbally warned the employee regarding the deficiencies. See O'Neill Aff., ¶ 7. If the employee did not improve, Target placed the employee on a written "Phase I" warning, which instructed the employee to remedy the deficiencies during a specific time period or face further discipline. id., ¶ 8. If the employee still did not improve, Target moved the employee to a written "Phase II" warning. See id. At Phase II, Target warned the employee that if he or she still failed to improve, Target may terminate employment for poor performance. See id. Although Target

gave all employees an opportunity to resign at the Phase II warning, the employee could instead cure the performance problems and move out of the Phase discipline process. See id., ¶ 12. In cases of serious misconduct, Target maintained the right to terminate an employee without proceeding through the Phases. See Jakubik Aff., ¶ 6.

Plaintiffs are African-American males who seek damages on each of the claims. Target responds that it promotes diversity in its workplace and in its executive team by expressly prohibiting discrimination and harassment. Procedures for resolving complaints of discrimination or harassment are outlined in the Target Stores Executive Handbook. See O'Neill Aff.,Ex.Z.

B. Plaintiff Black

Target hired James Black ("Black") in April 1994. See Barry Aff., Ex. A. In August 1995, Black was a softlines Team Lead at the Lake Street Target store, where Merrill Nelson was the STL. During that period, Black allegedly was involved in an incident with Cheryl Ripplinger, a subordinate employee. Upon Nelson's request, Vicki Kessler helped investigate the incident between Ripplinger and Black. Target employed Kessler as a Regional Personnel Manager and she often assisted investigations of sexual harassment allegations involving Target employees. See Kessler Aff., ¶ 3.

In a statement to Target management, Ripplinger alleged that Black led her into a stockroom, unzipped his pants, exposed his penis, and said, "I want to put this in you so bad. I'm horny." id., ¶ 4; Kessler Aff., Ex. A. Ripplinger's co-workers reported to Target that Ripplinger had related a consistent account of the incident with Black shortly after it had happened. See id., Ex. B, C, D. Black confirmed to Patrick Gingles his unprofessional conduct involving Ripplinger. See Gingles Depo., at 34. During the investigation, Black told Nelson and Kessler that the encounter was "mutual." See id., ¶ 8; Ex. Q. Black later said that Ripplinger initiated the incident. See Black Depo., at 10-12. Target's

investigation revealed other inappropriate conduct by Black. Other female employees said that Black had made sexually suggestive comments about their appearance, kissed them in the stock room, or asked them out on dates. See Kessler Aff., Ex. E-L, Black acknowledged many of the complaints and conceded that his actions were inappropriate for a Target executive. See id., ¶ 8. Kessler concluded that Ripplinger's allegation was credible under the circumstances. See id., ¶ 8. Based on the accumulated information regarding Black's improper behavior, Target terminated Black on August 24, 1995. See id., ¶ 8. In Target's judgment, Black's discharge was warranted by his misconduct toward a subordinate employee. See id., ¶ 11.

C. Plaintiff Glasper

Target hired Glasper in June 1993. Initially, Glasper's performance was satisfactory. While working at the Cottage Grove Target store in 1995, however, Glasper received poor performance ratings. See Jakubik Aff., Ex. LL. Glasper's Executive Performance Review dated March 2, 1995, showed a Big Team score of 80, a Little Team score of 60, and an individual performance score of 56. See id., Ex. LL. Although the store was doing well overall, Glasper's scores were deemed unacceptably low and unsatisfactory for a Target executive, See id., ¶ 11. Glasper transferred to the Eagan Target store in March 1995, where he worked as Merchandise Team Lead for softlines. See id., ¶ 3.

At the Eagan Target store, Glasper continued to display performance inadequacies while under the supervision of Michael Anderson, who was the STL, and Stephanie Bertram, an ASTL. Anderson discussed Glasper's unsatisfactory performance with him on several occasions and told him to improve his leadership skills. See Jakubik Aff., Ex. A, E; Glasper Depo., at 167-73. Bertram also pointed out performance deficiencies to Glasper, counseled him on ways to improve his performance, and gave him specific tasks to accomplish. See id., Ex. B, C, F, G, J, K, P, S; Glasper Depo., at 174-79. Bertram later noted that many of those

tasked remained unaccomplished. See Jakubik Aff., Ex. K, L, P. Glasper's supervisors, Anderson and Bertram, were dissatisfied with his performance and concluded that disciplinary action was necessary. See id., ¶¶ 4-6; Ex. F.

Glasper received Target's "Industrial Due Process" checklist procedure to ensure that he had been given performance counseling regarding his deficiencies as a Target executive. See Jakubik Aff, Ex. 1. Target then issued Glasper a "Phase I" warning on January 8, 1996. See id., Ex. U. Target directed Glasper to lead his team more effectively, motivate his subordinates, and develop and prioritize plans to accomplish tasks. Target also warned Glasper that failure to improve his performance would result in further discipline. Pursuant to the Phase I process, Glasper prepared a plan acknowledging his deficiencies and set out ways to improve. See id., Ex. W; Glasper Depo., at 285.

During the Phase I warning period, however, Anderson and Bertram noted continued deficiencies in Glasper's leadership, problem-solving, planning, and follow-through performances. See Jakubik Aff., ¶¶ 8-9; Ex. II. Target issued Glasper a "Phase II" warning on February 23, 1996. id., ¶¶ 9-10; Ex. HH. Consistent with Target policy, Glasper had the options of accepting the Phase II and working to improve his performance, or resigning. Glasper opted to resign. See Glasper Depo., at 3 15-16. On March 4, 1996, Glasper tendered his resignation to be effective April 21, 1996. See, Ex. JJ. Glasper's 1996 Executive Performance Review, resulted in a Big Team score of 92.99, a Little Team score of 56.66, and an individual performance score of 50.00. Jakubik Aff., Ex. KK. Glasper's scores were unacceptably low and unsatisfactory by Target's standards. ¶ 11.

D. Plaintiff Ritchie

Target hired Robert Ritchie in September 1994. Ritchie worked as a front-end Team Lead at the Edina Target store, where Kamal Sleem was the STL. Sleem believed Ritchie had potential, but noted deficiencies in his

performance. See Sleem Aff., ¶4. Sleem noticed that Ritchie was not good with follow-up and had difficulty with accountability, exhibiting a tendency to blame others for his problems. See id., ¶ 4. Sleem completed Ritchie's 1995 Executive Performance Review, giving him a Big Team score of 84, Little Team score of 72, and a individual performance score of 72. Ritchie's scores were relatively low by Target's standards.fn1 Ex.A.

In early 1995, Nelson, the Lake Street store STL, told Sleem that he was interested in increasing the diversity of the executive team at the Lake Street Target store. See Sleem Aff., ¶ 6. Nelson expressed interest in having Ritchie work at the Lake Street store and Sleem arranged Ritchie's transfer. See ¶ 6. In March 1995, Ritchie became the front-end Team Lead at the Lake Street Target store. See O'Neill Aff., ¶ 6.

The Lake Street store was remodeling its front end around the time Ritchie arrived. See Ritchie Depo., at 43-44. The remodeling project installed a new cashier system known as "remote tender," which involved two employees at each lane, one ringing up the goods and the other collecting payment. See Nelson Depo., at 59; Ritchie Depo., at 48. Remote tender was designed to prevent theft and improve efficiency. Nelson Depo., at 61.

Nora O'Neill, an ASTL, was Ritchie's supervisor at the Lake Street store. See id., ¶ 6. Because O'Neill found Ritchie's performance to be unsatisfactory, on March 27, 1995, she issued Ritchie a verbal warning and provided him with performance counseling regarding his need for improvement. See id., ¶¶ 6-7; Ex. B. Nelson and O'Neill met with Ritchie to discuss his performance deficiencies on March 30, 1995. See id., ¶ 7; Ex. C. Their concerns included incomplete tasks, scheduling problems, lack of accountability, lack of initiative, and inadequate crisis management. See id., Ex. C. On May 1, 1995, Nelson and O'Neill again met with Ritchie to discuss numerous performance problems. See O'Neill Aff., ¶ 7; Ex. D. Ritchie failed to address a problem under his supervision concerning inaccurate American Express money order

transactions, amounting to shortages of several thousand dollars. See id., Ex. F. Nelson and O'Neill placed Ritchie on Phase I warning because of his performance deficiencies. See id., ¶¶ 8-9.

Ritchie received Target's "Industrial Due Process" checklist procedure to ensure that he had been given performance counseling regarding his deficiencies as a Target executive. See O'Neill Aff., Ex. G. Target then issued Ritchie a"Phase I" warning on May 8, 1995. See id., Ex. H. Target informed Ritchie that he must follow directions and instructions of supervisors, prepare and prioritize plans, follow through on commitments, and be accountable for problems. See id., Ex. H. Target also warned Ritchie that he must improve his performarwe or face further discipline. With O'Neill's help, Ritchie prepared a plan in which he acknowledged his deficiencies and outlined methods to improve them.

During the Phase I warning period, however, Ritchie's performance did not improve. Ritchie failed to walk the sales floor, cover guest service calls, and manage maintenance. See O'Neill Aff., Ex. J, K. Additionally, Ritchie overspent payroll in excess of 200 hours and failed to account for the overspending by more than $8,000. See id., Ex. N, P. Furthermore, Ritchie still failed to address the American Express money order transactions problem. id., Ex. Q, R, T. Anne Markle, a supervising Target executive, concluded, "his lack of sense of urgency was incredible. It was actually appalling." id., Ex. R. Ritchie failed to return pharmacy money bags even though he checked them off as having been returned. See id., Ex. T. Ritchie continued to deflect responsibility and blamed others for his problems. See Ritchie Depo., at 68-71; 329-36.

Target issued Ritchie a Phase II warning on June 7, 1995. In accord with Target policy, Ritchie had the choice between accepting the Phase II warning and attempting to improve his performance, or resigning. Ritchie elected to resign his position at Target. See O'Neill Aff., ¶ 12; Ex. W, X.

E. The "White Privilege" remark

Plaintiffs' race discrimination claims place great emphasis on a "white privilege" remark allegedly made by Nelson.fn2 Black alleged that Nelson said at a diversity meeting that he had "white privilege. . . I understand it and I'm not willing to give it up." Black Depo., at 107. Glasper stated that Nelson made the "white privilege" comment during a discussion of issues involving minorities and diversity in the Target stores. Glasper Depo., at 33-35. Such a diversity meeting encourages an open dialogue among the participants. Although Nelson has denied making the comment, for purposes of summary judgment the Court must assume he did. See Nelson Depo., at 27. The diversity meeting at which Nelson allegedly made the "white privilege" comment was held in either April or May of 1995. See Black Depo., at 106-18, 227-28. Black claims that Nelson, Kumal Sleem, Glasper, and Ritchie were present at the meeting. See Black Depo., at 106-18. However, Ritchie said that he did not attend the meeting at which Nelson allegedly made the "white privilege" remark. See Ritchie Depo., at 79. Finally, there is no evidence that Nelson ever repeated such a remark in any context outside of that diversity meeting. See Jakubik Depo., at 18; Edwards Depo., at 9.

III. DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A genuine issue of material fact does not exist "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The movant has the burden of showing that no genuine issue of material fact

exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once the movant meets its Rule 56(c) burden, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. p. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably fmd for the [non-rnovant]." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 252 (1986). When weighing the evidence offered by the parties on a motion for summary judgment, this Court must review the evidence and all inferences drawn from that evidence in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587. The nonmovant, however, "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586.

B. Legal Framework for Race Discrimination Claims

Plaintiffs each assert race and retaliation discrimination claims under Title VII, Section 1981, and the MHRA. These claims fn3 are analyzed under the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) and clarified by St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Kerns v. Capital Graphics,inc., 178 F.3d 1011, 1017-18 (gth Cit 1999). Under this analysis, a plaintiff has the burden of establishing a prima facie case of discrimination to support a legal presumption of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802-05; Kerns, 178 F.3d at 10 17-18. If a plaintiff successfully establishes a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. id. If the employer meets this burden, the presumption created by the prima facie case is rebutted and the legal presumption of unlawful discrimination falls from the case. See Burdine. 450 U.S. at 253. The burden of production then shifts back to the plaintiff to show that the proffered reason was not the true reason for its action and

that the employer intentionally discriminated due to plaintiff's protected class status. Hicks, 509 U.S. at 509; Kerns, 178 F.3d at 1018. This final burden-shifting analysis requires a two-part showing that: first, the employer's proffered reason is pretextual for its discriminatory action; and, second, that its intentional discrimination is the real reason for the adverse employment action. Hicks, 509 U.S. at 515; Kerns, 178 F.3d at 1018.

C. Prima Facie Showing of Race Discrimination

To establish a prima facie case of racial discrimination in the employment context, each Plaintiff must establish that: (1) he is a member of a protected class; (2) he was qualified for the job he was performing; (3) he suffered adverse employment action or was discharged; and (4) similar employees not in the protected class received different treatment. See Smith v. DataCard, 9 F. Supp.2d 1067, 1079 (D. Minn. 1998). Plaintiffs are able to meet only three of the elements of a prima facie case. As African-Americans, Plaintiffs are members of a protected class. Plaintiffs were qualified for their jobs because Target hired them for the executive positions in the store. When Target discharged Black for misconduct with a subordinate employee, he suffered adverse employment action. When Target placed Glasper and Ritchie in the progressive discipline process, they suffered adverse employment action. Although they establish three elements, Plaintiffs are unable to establish the fourth requisite element of the prima facie case.

1. Black

The fourth element of the prima facie case requires Black to prove that similarly situated white employees were treated differently. See Smith, 9 F. Supp.2d at 1079. This element demands proof that some other Target employee, facing similar accusations and evidence, was treated better than Black. Ghane v. West, 148 F.3d 979, 982 (8th Cir. 1998). Here, Black failed to present any evidence of dissimilar treatment. Target's investigation revealed that Black, an

executive, engaged in sexual misconduct with a subordinate employee and other inappropriate behavior towards Target employees. Black cannot point to another Target executive who was not dismissed after Target's discovery of such an incident. Thus, Black fails to establish the prima facie case for discrimination.

2. Glasper

The fourth element of the prima facie case also requires Glasper to prove that some other Target employee, who experienced similar performance difficulties, received better treatment than Glasper in the progressive discipline process. Ghane, 148 F.3d at 982. Here, like Black, Glasper failed to present any evidence of dissimilar treatment. Target applied to Glasper the same standards it applied to all similarly situated employees. See Jakubik Depo., at 144. Glasper was unable to name any other employees who were not held to the standards Target applied to Glasper. Glasper Depo., at 269-71. He also was unable to identify any other employees who received better treatment under similar circumstances. See id., at 297-99, 322. Glasper fails to establish the prima facie case for racial discrimination because he presents no evidence that Target treated a similarly situated white employee differently in the progressive discipline process.

3. Ritchie

To establish a prima facie case, Ritchie, like Glasper, must demonstrate that other employees with similar performance deficiencies did not receive progressive discipline. Ritchie offers for comparison two employees: his predecessor, Troy Renslow, and successor, Janie Gullord. An examination of their performance records, however, reveals that neither Renslow nor Gullord were comparable to Ritchie.

The record shows that both Renslow and Gullord had superior performance records to Ritchie. See O'Neill Aff. ¶¶

5, 14, Ex. A, Y; O'Neill Depo., at 23, 61-62, 119-20; Nelson Depo., at 51, 153-54. Because Ritchie never observed the front end under Gullord's supervision and Gullord's performance ratings were higher than his, Ritchie cannot claim that she is a similarly situated employee who received better treatment. Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 252 (8th Cir. 1995) (requiring evidence that employer "treated comparably rated employees differently"); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777 (8th Cit. 1995) (same). Likewise, Ritchie cannot argue that Renslow was a comparable employee because Renslow's supervisors concluded that he performed far better than Ritchie. O'Neill Aff., ¶¶ 4-5, Ex. A; O'Neill Depo., at 23, 119-20; Nelson Depo., at 51, 153-54. Because Ritchie fails to demonstrate that he performed as well as Renslow and Gullord but received progressive discipline, Ritchie cannot argue that comparable employees received better treatment.

Ritchie further argues that Renslow and Gullord received better treatment because they were "not forced to implement remote tender." Ritchie Depo., at 73. However, remote tender was not discontinued at his departure and was used during Gullord's supervision of the front end. Baker Depo., at 24; Gullord Aff., ¶ 6. Even if Ritchie's claim were true, it does not prove anything related to Ritchie's discipline. Remote tender required Target to remodel the Lake Street store, purchase software, and retrain many employees. O'Neill Aff., ¶ 4. Ritchie was not at the Lake Street store when Target made the decision to experiment with remote tender and it was not implemented until about a month after Ritchie arrived at Lake Street. See id. Thus, Target implemented remote tender as an experiment, not as a result of a motive to victimize Ritchie. Furthermore, most of Ritchie's performance problems were unrelated to remote tender. See supra § II (D). As Ritchie admitted, only one of the items listed on his Phase I warning related to remote tender difficulties. Ritchie Depo., at 27-29.

Finally, Ritchie cannot show that Target treated Ritchie by different standards than those it applied to other

employees. Target executives who witnessed the performance and evaluations of Renslow, Ritchie, and Gullord testified that they were all measured by similar criteria. Baker Depo., at 37, 125-26; O'Neill Aff., ¶ 15. Baker explained that Nelson's "standards were extremely high" for all employees "white or black." Baker Depo., at 126. Ritchie fails to establish the prima facie case for racial discrimination because he fails to present evidence that Target treated similarly situated white employees differently in the progressive discipline process.

D. Target's Nondiscriminatory Reasons for the Employment Action Taken

Assuming Plaintiffs had successfully established a prima facie case, the burden shifts to Target to show a nondiscriminatory basis for its conduct. Target meets its rebuttal burden by presenting legitimate, nondiscriminatory reasons for its disciplinary actions taken against Plaintiffs.

1. Black

Target has articulated a legitimate basis for Black's termination: he engaged in inappropriate conduct with a subordinate employee. Black is unable to establish a genuine issue of material fact regarding the circumstances surrounding his termination. Ripplinger complained to Target about Black's behavior in the stock room. See supra, § II (B). Other employees corroborated Ripplinger's account of the incident while some other employees reported other inappropriate conduct by Black. id. Finally, Target in good faith believed Ripplinger's account of the incident and other employees' complaints about Black. See id.

Target is entitled to establish its own performance standards and use its business judgment to enforce them. The Eighth Circuit has held that courts should not act as a "super-personnel department" or revisit the wisdom of employment decisions. See Hutson, 63 F.3d at 781; McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 511(8th Cir. 1995) ("Employers

have wide latitude to make business decisions."). Courts give deference to an employer's ability to make credibility judgments when they decide whether to impose discipline following allegations of misconduct. Ellison v. Darden Restaurants. Inc., 52 F.Supp.2d 747, 752 (S.D. Miss. 1999) (granting summary judgment on race discrimination claim and holding that employer had right to decide employee altered time cards based on statements of co-workers). Thus, the Court will not second-guess Target's investigation into reported misconduct and its disciplinary discretion.

Black's attempt to create an issue of fact about the surrounding circumstances of the stock room incident between him and Ripplinger misses the point. In Agugliaro v. Brooks Bros., 927 F. Supp. 741,747 (S.D. N.Y. 1996), the court granted summary judgment to an employer who terminated an employee for sexually harassing a co-worker. See id, at 744. The Agugliaro court reasoned that because the employer in good faith believed the employee had sexually harassed a co-worker, it was irrelevant whether the employee actually did so, and his efforts to create a fact issue regarding the incident did not preclude summary judgment. at 747. The same reasoning applies here. After an investigation, which uncovered employees' corroboration of Ripplinger's story and other similar complaints about Black, Target in good faith believed Ripplinger's account of the incident in the stock room with Black. Target took disciplinary action against Black and he has presented no evidence that Target's decision was not made in good faith. In sum, Target has presented a nondiscriminatory reason for its decision to terminate Black's employment.

2. Glasper

Target has provided a legitimate basis for imposing the progressive discipline procedures on Glasper: unsatisfactory performance. Glasper's 1995 and 1996 Executive Performance Reviews were poor. supra § II (C). Glasper's supervisors continually identified performance deficiencies to him and counseled him on methods of

improvement. See id. Target issued Glasper a Phase I warning, yet his performance failed to improve. id. Target issued Glasper a Phase 11 warning and Glasper elected to resign. See id. Throughout Glasper's progressive discipline, Target followed procedures consistent with its policy.

Target is entitled to establish its own objective and subjective performance standards and use its business judgment to enforce them. Stuart v. General Motors Corp., 217 F.3d 621, 637 (8th Cir. 2000). Furthermore, the Eighth Circuit has held that courts should not act as a "super-personnel department" or revisit the wisdom of employment decisions. Hutson, 63 F.3d at 781; McLaughlin, 50 F.3d at 511 ("Employers have wide latitude to make business decisions."). The fact that Glasper may have thought highly of his own performance is irrelevant. Glasper must show that he met Target's expectations. Glasper is unable to show that he met Target's performance expectations.

3. Ritchie

Target has provided a legitimate reason unrelated to race for imposing the progressive discipline procedures on Ritchie: deficient performance. Ritchie's 1995 Executive Performance Review scores were low. See supra, § II (D). O'Neill, Ritchie's supervisor, waned Ritchie about his deficient performance and counseled him on methods of improvement. See id. Ritchie's other supervisors, Nelson and Markie, also noted his performance problems. After Target issued Ritchie a Phase I warning, his performance did not improve. See id. Target then issued Ritchie a Phase II warning and Ritchie elected to resign. See id. Target followed procedures consistent with its policy during Ritchie's progressive discipline. Like Glasper, Ritchie is unable to demonstrate that his performance met Target's expectations.

E. Plaintiff's Burden of Showing Race Discrimination

Once Target has articulated a nondiscriminatory basis for its disciplinary actions, the burden shifts back to Plaintiffs

to create (1) "a fact issue as to whether [the] proffered reasons arc pretextual" and (2) "a reasonable inference that [race] was a determining factor" in the discipline. Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996). Hicks, 509 U.S. at 515 (stating that plaintiff must show both that the reason was false, and that discrimination was the real reason). The second aspect of the inquiry "may be satisfied without additional evidence where the overall strength of the prima facie case and the evidence of pretext 'suffices to show intentional discrimination." Rothmeier, 85 F.3d at 1336-37. However, Plaintiffs bear the burden of persuasion as to the ultimate issue of intentional discrimination. Here, each Plaintiff fails to present evidence sufficient to create a genuine issue of material fact regarding pretextual reasons and intentional discrimination. Thus, summary judgment is appropriate.

1. Evidence of Pretext

To demonstrate that Target's asserted reasons for its disciplinary action were pretextual, Plaintiffs must present sufficient evidence to prove Target's discipline was racially motivated. Thomas v. Runyon, 108 F.3d 957, 960-61 (8th Cir. 1997). The burden is on the Plaintiffs to show that a "discriminatory animus" lies behind Target's neutral explanations. Roxas v. Presentation College, 90 F.3d 310, 316 (8th Cir. 1996). Tn this case, Plaintiffs failed to present any evidence which would create a genuine issue of material fact that Target's proffered reasons for its disciplinary action were pretexts for unlawful racial discrimination.

a. Black

As discussed above, Black cannot dispute Target's legitimate reasons for terminating his employment. Further, Black fails to present any evidence that Target's legitimate, nondiscriminatory reason for terminating his employment was a pretext for racial discrimination. The record indicates that Target acted in good faith reliance on reports from Ripplinger and other employees regarding Black's

misconduct in reaching its determination to terminate Black. Absent a showing that Target's basis for its disciplinary action was false, this Court will not act as a "super-personnel department" and re-examine the good faith business judgments made by Target. See Hutson, 63 F.3d at 781.

b. Glasper

Clasper cannot create a genuine issue of material fact regarding his progressive discipline due to performance problems. Glasper has no evidence that Target's reason, deficient performance, was a pretext for racial discrimination. Glasper's supervisors recorded Glasper's deficiencies in numerous contemporaneously created documents. See supra, § II (C). Glasper failed to improve his performance after verbal warnings and the written Phase I warning. Glasper has presented no evidence that Target's legitimate, neutral reasons for issuing him the Phase warnings were a pretext for racial discrimination.

c. Ritchie

Ritchie has failed present evidence that Target's legitimate basis for his ogressive discipline was a pretext for racial discrimination. The fact that Target executives found Ritchie's performance to be unsatisfactory and counseled him to improve is well documented. See supra, § II (D). Ritchie acknowledged that the contemporaneously generated documents identifying his performance deficiencies are accurate. See Ritchie Depo., at 21-22, 60-64, 253-55, 259-60, 325-27, 329-36. Ritehie argues that some performance problems were not his fault and were caused by remote tender. See id. 25 7-60. However, many of Ritchie's performance deficiencies were unrelated to remote tender. See supra, §§ II (D), III (C)(3); Ritchie Depo., at 27-29.

Ritchie also argues that his performance difficulties were not his fault because the problems were everyone else's responsibility. Ritchie Depo., at 273, 326-27, 329-31, 331-36. Ritchie's attempts to blame others illustrates a key

deficiency with his own performance as a Target executive: a failure to take responsibility for identifying and resolving problems. supra, § II (D). Sleem Aff., ¶ 4; O'Neill Aff., Ex. H, J-0. Ritchie's performance problems indicate that Target's reasons for disciplinary action were legitimate and not pretextual.

2. Intentional Discrimination

Where Plaintiffs' prima facie case and showing of pretext, considered as a whole, fail to create a reasonable inference of discriminatory animus, Plaintiffs must produce additional evidence that would allow a reasonable jury to infer that the real reason for Target's disciplinary actions was racial discrimination. Rothmeier, 85 F. .3 d at 1336. In other words, Plaintiffs must present evidence that creates a reasonable inference that race was a determining factor in Target's disciplinary actions. Here, Plaintiffs fail to present evidence sufficient for a jury reasonably to infer that racially discriminatory animus motivated Target's employee discipline processes.

Plaintiffs race discrimination claims rest heavily on the "white privilege" remark allegedly made by Nelson at the diversity meeting in the spring of 1995. See supra, § II (E). "Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference." Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999). The Eighth Circuit has held that a decision-maker's equivocal remark made months before adverse employment action, which bore no relation to the decisional process, is insufficient to support a reasonable inference of discrimination. See Gartman v. Gencorp. Inc., 120 F.3d 127, 131 (8th Cir. 1997). Such stray remarks in the workplace are insufficient to preclude summary judgment. Simmons v. Oce-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) (finding racial remark to be neither close in time nor causally related to adverse employment decision). Nelson made his remark in the context of a diversity meeting, which requires candor from

the participants. Such circumstances demonstrate that the remark was an isolated comment, far-removed from the disciplinary process. Plaintiffs have failed to demonstrate any nexus between the stray remark by Nelson and Target's disciplinary actions against them. Gold Star Taxi and Transp. Ser. v. Mall of America, 987 F. Supp. 741, 747 (D. Minn. 1997) (finding plaintiffs did not provide evidence of a nexus between racial comments and contract decision).

a. Black

Black lacks any evidence that racial discrimination was a determining factor in his dismissal. When asked why he thought Nelson decided not to believe his version of the incident, Black alleged that Nelson did not support him "because of Vicki Kessler." See Black Depo., at 115. Black alleges that Kessler was "angry and hostile" at their meeting and that she "had nothing to do" with human resources at the Lake Street store. See Black Depo., at 110-11. Even if Kessler were upset with Black, however, there is no evidence that her feelings were racially based. Furthermore, Kessler's position as regional personnel manager assisting in the investigation of employee misconduct is not evidence of racial discriminatory animus.

Black also alleges that Nelson's "white privilege" remark is proof of intentional discrimination. Black Depo., at 107. Target dismissed Black for misconduct in August of 1995, which was several months after Nelson allegedly made the remark. A period of several months makes the remark insufficiently proximate in time to create a reasonable inference of discrimination. See Gartman, 120 F.3d at 131. Additionally, Black has presented no evidence
that Nelson's remark was causally related to his termination for misconduct toward a subordinate. Simmons, 174 F.3d at 915. Thus, Nelson's alleged remark is a "stray remark" insufficient to preclude summary judgment. See supra, § II (E). In sum, Black fails to present sufficient evidence that Target's legitimate reason was false, and that racial discrimination was the real reason for Target's termination of

Black. Summary judgment is therefore proper.

b. Glasper

Glasper fails to provide any evidence that his discipline was due to his race.fn4 To show that his progressive discipline was a result of racial discrimination, Glasper points to Nelson's alleged "white privilege" comment. However, Glasper had received a poor performance review prior to Nelson's remarks in April or May of 1995. See supra, § II (C). Furthermore, Nelson's stray remark is irrelevant to Glasper's progressive discipline at the Eagan store because Nelson worked at the Lake Street store and played no role in any employment decision related to Glasper. See Anderson Depo., at 13-15. Nelson's comment is an equivocal stray remark by a non-decisionmaker unrelated to the discipline process. See Gartman, 120 F.3d at 131; Simmons, 174 F .3 d at 915. Glasper is unable to show any causal connection between Nelson's stray remark and Target's progressive discipline of him for deficient performance.

Glasper also argues that racial discrimination is demonstrated by an alleged comment from a co-worker, Curt Tuchscherer, that "we had to work our butts off while you people had a nice little weekend" at diversity training. Glasper Depo., at 158-59. This alleged statement is a textbook example of a stray remark--equivocal in nature, by a non-decisionmaker, and unrelated to the discipline process. Gartman, 120 F.3d at 131; Simmons, 174 F.3d at 915; Gold Star Taxi, 987 F.Supp at 746.

Finally, Glasper argues that alleged comments by co-workers at a send-off party, to the effect that Lake Street store employees listened to rap music, are evidence that racial discrimination was the real reason for his discipline. Glasper Depo., at 160-61. Such comments again are stray remarks by non-decisionmakers, equivocal in nature, and unrelated to Glasper's discipline process. Gartman, 120 F.3d at 131; Simmons, 174 F.3d at 915; Gold Star Taxi, 987 F.Supp at 746. Glasper presents no evidence that discriminatory

animus was behind Target's disciplinary actions. Because Glasper fails to create a genuine issue of material fact that Target disciplined him for any reason other than deficient performance, summary judgment is appropriate.

c. Ritchie

Ritchie fails to present evidence that his race was a determining factor in Target's disciplinary actions.fn5 Ritchie also points to Nelson's alleged "white privilege" comment to demonstrate that his progressive discipline was a result of racial discrimination. Ritchie's attempt to impute racial animus into his progressive discipline from this stray remark is misguided for several reasons. First, Ritchie already had received a low evaluation from Kamal Sleem at the Edina store before Nelson's alleged remark. See supra, § II (D). Additionally, Ritchie was not at the diversity meeting where Nelson allegedly made the "white privilege" remark. Ritchie Depo., at 79. The context in which Nelson made his remark had nothing to

do with Ritchie. Furthermore, Nelson had requested that Ritchie work at the Lake Street store to increase the diversity of the executive team. Finally, Nelson was not the sole decision-maker in Ritchie's progressive discipline because other Target executives, such as O'Neill and Markle, noted Ritchie's performance deficiencies. See supra, § II (D). Ritchie has shown no nexus between Nelson's stray remark and Target's disciplinary actions against him.

Ritchie further argues, in effect, that he was a scapegoat for the failure of remote tender. However, Target's allegedly unsuccessful attempt to implement remote tender in the Lake Street store does not indicate that race was a determining factor in Ritchie's progressive discipline. Because Ritchie presents no evidence that racial discrimination lurked underneath Target's disciplinary actions, he fails to create a genuine issue of material fact that Target disciplined him for something other than deficient performance. Summary judgment is therefore appropriate.

F. Hostile Work Environment

Plaintiffs' hostile work environment claims fail for several of the same reasons as their race discrimination claims. To establish a hostile work environment claim, Plaintiffs must show:

(1) they belong to a protected group; (2) they were subject to unwelcome harassment based on race; (3) the harassment affected a term, condition, or privilege of employment; and (4) their employer knew or should have known of the harassment and failed to take proper remedial action. See Callanan v. Runyon, 75 F.3d 1293, 1296 (8th Cir. 1996). As discussed in section III (D)-(E), Plaintiffs have not met their burden of showing that Target's disciplinary actions against them were based on race. In fact, Target's disciplinary actions against Plaintiffs were grounded in Plaintiffs' misconduct or deficient performance. See supra, §§ II (B)-(D); III (D)-(E). Target's discipline of Plaintiffs was not based on race, but on its legitimate performance expectations for Target executives. id. Additionally, Plaintiffs fail to show that Target treated similarly situated employees differently than Plaintiffs. supra, §§ HI (C) (1)-(3). Because Plaintiffs lack evidence of racial discrimination, summary judgment is granted.

Additionally, summary judgment is appropriate because Plaintiffs have failed to present evidence showing "under the totality of the circumstances that the harassing conduct was 'so severe or pervasive that it created an abusive working environment." Callanan, 75 F.3d at 1296 (citations omitted). Plaintiffs have not shown any conduct by Target that rises to the level of "an ongoing nightmare for the employee victim." Gipson v. KAS Snacktime Co., 83 F.3d 225, 229 (8th Cir. 1996).

G. Aiding and Abetting

First, Plaintiffs' aiding and abetting claims against individuals are all time-barred because no individual

Defendant was named in a timely-filed administrative charge of discrimination. See Schmitt Aff., Ex. P; State v. RSJ. Inc., 552 N.W.2d 695, 699-700 (Minn. 1996) (granting summary judgment on aiding and abetting claims because charge did not include individual defendant). See also Coffey v. Hennepin County, 1998 U.S. Dist. LEXIS 15205, *17 (D. Minn. April 28, 1998) ("because the individually named Defendants were not named as respondents to Plaintiffs EEOC and MHRA charges, they must also be dismissed from the MHRA claims"), subsequent proceedings, 23 F.Supp.2d 1081 (D. Minn. 1998). Furthermore, Plaintiffs' aiding and abetting claims fail because their underlying claims for racial discrimination are inadequate as a matter of law. Smith, 9 F. Supp2d at 1081. Defendants cannot aid and abet a nonexistent violation. Plaintiffs failed to present evidence that the individual Defendants acted intentionally. See Wallin v. Minnesota Dep't. of Corrections, 598 N.W.2d 393, 406 (Minn. Ct.
App. 1999) (granting summary judgment in part due to absence of intent). Nor have Plaintiffs demonstrated that the Defendants' conduct was objectively unreasonable. Wallin, 598 N.W.2d at 406 (granting summary judgment in part because defendants' conduct was not unreasonable). Summary judgment is appropriate for Plaintiffs' aiding and abetting claims.

H. Defamation

Glasper bases his defamation claim upon statements made by Target in his performance evaluations and disciplinary warnings. See Pl.'s Mem. Opp. Summ. J., at 47. To prove a claim of defamation, Glasper must establish that the alleged statement was made, that it was communicated to someone other than Glasper, that it was false, and that, as a result, Glasper's reputation was damaged. Stuempges v. Parke. Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980). An employer possesses a qualified privilege to make statements about employees if the employer had a proper purpose and arranged a proper occasion to communicate the statement after a reasonable investigation into the underlying facts.

Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 380 (Minn. 1990). The alleged defamatory statements concerned Glasper's job performance and occurred in Glasper's performance evaluations by Target management. See supra, § II (C). Target took reasonable steps to investigate Glasper's performance and had reasonable grounds- for making the evaluations. id. The record shows that Target's statements about Glasper's performance were "made in good faith and for a legitimate purpose." See Stuempges, 297 N.W.2d at 257. On these facts, Target's evaluations of Glasper's performance are protected by a qualified privilege unless Glasper shows they were made with actual malice. See Karnes v. Milo BeauW and Barber Supply, 441 N.W.2d 565, 568 (Minn. App. 1989). Glasper has presented no evidence that Target provided his performance evaluations with actual malice. supra §§ II (C): III (E)(1)(b), (2)(b).

Furthermore, Glasper fails to explain why Target's alleged statements were false and how his reputation was harmed by such statements. Glasper also fails to identify persons to whom Target published the statements. Glasper was previously warned that his vague "Libel/Slander/Defamation" claim needed elucidation. June 11, 1998 Order, p. 6. Because Glasper still falls short of creating a genuine issue of material fact on his defamation claim, surnniary judgment is appropriate.

I. Emotional Distress

Glasper premises his emotional distress claim upon the racial discrimination allegedly inflicted on him by Target. See Pl.'s Mem. Opp. Summ. J., at 49. However, Glasper's race discrimination claim is legally inadequate. See supra, § III (C)-(E). Thus, Glasper's emotional distress claim also fails.

An emotional distress claim requires Glasper to show that Target (1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct; (3) causing him emotional distress; and (4) the distress was severe. See Hubbard v.

United Press International, Inc., 330 N.W.2d 428, 43 8-39 (Minn. 1983). The Minnesota Supreme Court has stressed the limited scope of such claims and warned that they are "sharply limited to cases involving particularly egregious facts." Hubbard, 330 N.W.2d at 43 8-39. Glasper must show distress "so severe that no reasonable man could be expected to endure it." Hubbard, 330 N.W.2d at 438-39. Glasper has failed to identify any extreme or outrageous conduct by Target. Without identifying any specific facts in the record, Glasper merely makes conclusory assertions, arguing, "Defendant's discriminatory treatment and defamation of Glasper here passes all bounds of decency and is utterly intolerable in a civilized community." Pl.'s Mem. Opp. Summ. J., at 49. Furthermore, Glasper has not shown the requisite degree of emotional distress. Glasper merely presents general allegations of anxiety, depression, and sleeplessness arising out of his discipline at Target. See Glasper Depo., at 326-36. Finally, Glasper has presented no evidence that Target intentionally or recklessly caused emotional distress to Glasper during his progressive discipline. Summary judgment is appropriate because no rational jury could find the requisite elements for Glasper's emotional distress claim.

IV. CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment [Doc. No. 82] is

GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:
ANN D. MONTGOMERY UNITED STATES DISTRICT JUDGE
Dated:

Footnotes

1 Ritchie's successor, Janie Gullord, received scores of 94, 88, and 90, respectively. O'Neill Aff., Ex. Y.

2 Indeed, the remark is ubiquitous in Plaintiffs' Memorandum in Opposition to Summary Judgment and formed the theme for counsel's argument on the motion.

3 Title VII, Section 1981, and the MHRA claims are all subject to this burden-shifting analysis and have identical elements. Kim v. Nash Finch Co., 123 F.3d 1046, 1056 (8th Cir. 1997); Hubbard v. United Press Int'l Inc., 330 N.W.2d 428 (Minn. 1983).

4. In his memorandum, Glasper repeatedly cites his entire direct examination as his only evidence that racial discrimination was behind his progressive discipline.

5 Again, the supporting memorandum merely repeatedly cites Ritchie's entire direct examination as evidence that racial discrimination motivated his progressive discipline.

**363.03 Unfair discriminatory practices.**

Subdivision 1. **Employment.** Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age,

(a) to deny full and equal membership rights to a person seeking membership or to a member;

(b) to expel a member from membership;

(c) to discriminate against a person seeking membership or a member with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment; or

(d) to fail to classify properly, or refer for employment or otherwise to discriminate against a person or member.

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(3) For an employment agency, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age,

(a) to refuse or fail to accept, register, classify properly, or refer for employment or otherwise to discriminate against a person; or

(b) to comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly that the employer fails to comply with the provisions of this chapter.

(4) For an employer, employment agency, or labor organization, before a person is employed by an employer or admitted to membership in a labor organization, to

(a) require or request the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age; or, subject to section 363.02, subdivision 1, to require or request a person to undergo physical examination; unless for the sole and exclusive purpose of national security, information pertaining to national origin is required by the United States, this state or a political subdivision or agency of the United States or this state, or for the sole and exclusive purpose of compliance with the Public Contracts Act or any rule, regulation, or laws of the United States or of this state requiring the information or examination. A law enforcement agency may, after notifying an applicant for a peace officer or part-time peace officer position that the law enforcement agency is commencing the background investigation on the applicant, request the applicant's date of birth, gender, and race on a separate form for the sole and exclusive purpose of conducting a criminal history check, a driver's license check, and fingerprint criminal history inquiry. The form shall include a statement indicating why the data is being collected and what its limited use will be. No document which has date of birth, gender, or race information will be included in the information given to or available to any person who is involved in selecting the person or persons employed other than the background investigator. No person may act both as background investigator and be involved in the selection of an employee except that the background investigator's report about background may be used in that selection as long as no direct or indirect references are made to the applicant's race, age, or gender; or

(b) seek and obtain for purposes of making a job decision, information from any source that pertains to the person's race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age, unless for the sole and exclusive

purpose of compliance with the Public Contracts Act or any rule, regulation, or laws of the United States or of this state requiring the information; or

(c) cause to be printed or published a notice or advertisement that relates to employment or membership and discloses a preference, limitation, specification, or discrimination based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.

Any individual who is required to provide information that is prohibited by this subdivision is an aggrieved party under section 363.06.

(5) For an employer, an employment agency, or a labor organization, with respect to all employment related purposes, including receipt of benefits under fringe benefit programs, not to treat women affected by pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in their ability or inability to work, including a duty to make reasonable accommodations as provided by paragraph (6).

(6) For an employer with a number of part-time or full-time employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year equal to or greater than 25 effective July 1, 1992, and equal to or greater than 15 effective July 1, 1994, an employment agency, or a labor organization, not to make reasonable accommodation to the known disability of a qualified disabled person or job applicant unless the employer, agency, or organization can demonstrate that the accommodation would impose an undue hardship on the business, agency, or organization. "Reasonable accommodation" means steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person.

"Reasonable accommodation" may include but is not limited to, nor does it necessarily require: (a) making facilities readily accessible to and usable by disabled persons; and (b) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or

devices, and the provision of aides on a temporary or periodic basis.

In determining whether an accommodation would impose an undue hardship on the operation of a business or organization, factors to be considered include:

(a) the overall size of the business or organization with respect to number of employees or members and the number and type of facilities;

(b) the type of the operation, including the composition and structure of the work force, and the number of employees at the location where the employment would occur;

(c) the nature and cost of the needed accommodation;

(d) the reasonable ability to finance the accommodation at each site of business; and

(e) documented good faith efforts to explore less restrictive or less expensive alternatives, including consultation with the disabled person or with knowledgeable disabled persons or organizations.

A prospective employer need not pay for an accommodation for a job applicant if it is available from an alternative source without cost to the employer or applicant.

Subd. 6. **Aiding and abetting and obstruction.** It is an unfair discriminatory practice for any person:

(1) Intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter;

(2) Intentionally to attempt to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter;

(3) To intentionally obstruct or prevent any person from complying with the provisions of this chapter, or any order issued thereunder, or to resist, prevent, impede, or interfere with the commissioner or any of the commissioner's employees or representatives in the performance of duty under this chapter.

Subd. 7. **Reprisals.** It is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a perpetrator, employer, labor organization, employment agency, public accommodation, public service,

educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate salesperson, or employee or agent thereof to intentionally engage in any reprisal against any person because that person:

(1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter; or

(2) Associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin.

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

Subd. 8a. **Business discrimination.** It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service:

(a) to refuse to do business with or provide a service to a woman based on her use of her current or former surname; or

(b) to impose, as a condition of doing business with or providing a service to a woman, that a woman use her current surname rather than a former surname; or

(c) to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

Nothing in this subdivision shall prohibit positive action plans.

**Sec. 1981. - Equal rights under the law**

**(a)** Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

**(b)** "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

**(c)** Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law

**Sec. 1981a. - Damages in cases of intentional discrimination in employment**

**(a)** Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed

in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section -

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

**Sec. 2000e. - Definitions**

For the purposes of this subchapter -

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer

than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if

(1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or

(2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is

(A) twenty-five or more during the first year after March 24, 1972, or

(B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et

seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 et seq.);

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political

subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.), and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.).

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes,

including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

**Sec. 2000e-2. - Unlawful employment practices**

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to

discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

**(h)** Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

**(m)** Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

**Sec. 2000e-3. - Other unlawful employment practices**

**(a)** Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-

management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

**Sec. 2000e-7. - Effect on State laws**

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter